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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 161

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and DAVY C. MANER,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and LEE F. WHITE, O. R. SMILEY, and MAMIE SMILEY,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

C. G. SHULL, JR., and RUBY MAE SHULL, PHOEBE JO SHULL now JONES and J. B. JONES, GEORGE E. SHELTON and WYNONA A. SHELTON, HAL WELCH and JO WELCH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. D. McLAUGHLIN
Liberty National Bank Building
Paris, Texas
Counsel for Petitioners

of Counsel on the Brief:
LON KILE
Box 726
Hugo, Oklahoma

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UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Choctaw and Chickasaw Nations, petitioners herein, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit

entered on the 6th day of March, 1968, in three separate cases which were companion cases and which were consolidated for argument in the Circuit Court. A petition for rehearing in each of these cases was denied on April 8, 1968.

The first of these cases is the *Choctaw Nation and Chickasaw Nation* v. *The Atchison, Topeka and Santa Fe Railway Company and Davey C. Maner.* It is numbered 9572 in the United States Court of Appeals for the Tenth Circuit. In that case the defendants moved the District Court to dismiss the plaintiffs' petition. The Circuit Court of Appeals affirmed that order of the District Court.

The second of these cases is *Choctaw Nation and Chickasaw Nation* v. *St. Louis-San Francisco Railway Company, Lee F. White, O. R. Smiley and Mamie Smiley,* It is numbered 9573 in the United States Circuit Court of Appeals for the Tenth Circuit. In that case the defendants moved for summary judgment. The District Court sustained the motion. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court.

The third of these cases is *Choctaw Nation and Chickasaw Nation* v. *C. G. Shull, Jr., Ruby Mae Shull, Phoebe Jo Shull now Jones and J. B. Jones, George E. Shelton and Wynona A. Shelton, Hal Welch and Jo Welch.* It is numbered 9574 in the United States Court of Appeals for the Tenth Circuit. In that case the defendants moved the court for summary judgment. The District Court sustained the motion. The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the trial court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit in each of these cases was entered on March 6, 1968. In each of these cases petitions for rehearing were duly filed and were denied on April 8, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Does the United States under its authority as guardian of a dependent Indian tribe have the power to give lands the fee simple title to which is vested in the Indian tribe to others without rendering or assuming an obligation to render just compensation for them.

STATUTE INVOLVED

The statute involved is the second proviso to Section 14 of the Act of April 6, 1906 (34 Stat. 137), which reads:

> "Provided further, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title

thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality."

STATEMENT OF FACTS

The Choctaw Nation and Chickasaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, et al., involves approximately 200 acres of land. The Choctaw Nation and Chickasaw Nation v. St. Louis-San Francisco Railway Company, et al., involves approximately 32 acres of land. The Choctaw Nation and the Chickasaw Nation v. C. G. Shull, Jr., et al., involves approximately 40 acres of land. All of these tracts are among the lands ceded to the Choctaw Nation by the United States by the Treaty of Doaks Stand of April 18, 1820, and conveyed to it by patent dated March 23, 1842.

The Act of March 3, 1893,[1] created the Dawes Commission for the purpose of negotiating with the Choctaw and Chickasaw Tribes for the allotment of the tribal land in severalty. In 1897 that commission and the representatives from the Choctaw Nation and the Chickasaw Nation made what is known as the Atoka Agreement. This agreement provided among other things for the allotment in severalty of tribal lands to individual members of the tribe. The Atoka Agreement was incorporated into the Act of June 28, 1898,[2] called the Curtis Act.

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[1] 27 Stat. 645.

[2] 30 Stat. 505.

On February 28, 1902, the Congress enacted what is commonly referred to as the Enid and Anadarko Act.[8] It provided for the acquisition of railroad rights-of-ways across these tribal lands. Section 14 of that Act provides in part:

> "And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purpose * * *."

In 1903 the Atchison, Topeka and Santa Fe Railway Company acquired an easement for reservoir purposes on approximately 200 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. Atchison, Topeka and Santa Fe Railway Company, et al.

In 1902 the St. Louis-San Francisco Railway Company acquired an easement for reservoir purposes on approximately 40 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. C. G. Shull, Jr., et al. Also in 1902 the St. Louis-San Francisco Railway Company acquired an easement for reservoir purposes on approximately 32 acres which is the subject matter of Choctaw Nation and Chickasaw Nation v. St. Louis-San Francisco Railway Company, et al.

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[8] 7 Stat. 210.

In April 6, 1906, Congress passed an Act[4] to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian territory." The Choctaw Nation and the Chickasaw Nation are two of the Five Civilized Tribes. The second Proviso to Section 14 of that Act gives the title of the Choctaw Nation and the Chickasaw Nation in abandoned reservoirs to abutting landowners. The Act makes no provision for the payment of just compensation to the tribes.

Subsequent to the Act of April 6, 1906, the railroads abandoned the use of those three tracts.

The Choctaw Nation and the Chickasaw Nation contend that Section 14 violates the Fifth Amendment to the Federal Constitution to the extent that it attempts to take from them lands which belonged to them in fee simple and to give those lands to abutting land owners without the payment of just compensation to the tribes.

The Decision of the Court Below.

In its opinion, the court below said that it had repeatedly given effect to the second proviso and upheld the vesture of title in accordance therewith. It referred specifically to its decision in *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212, and to its decision in *United States* v. *Drumb*, 152 F.2d 821. The court below noted that the appellants had attacked those decisions on the grounds that they misconstrued the holdings of this Court in *Missouri, K. & T. Ry.* v. *Roberts*, 152 U.S. 114, and *Buttz* v.

[4] 32 Stat. 47.

Northern Pac. R.R., 119 U.S. 55. Those cases related to situations where the tribes had only a right of occupancy, the fee being vested in the Government. In the three cases at bar the fee title to the lands involved was vested in the Choctaw Nation and the Chickasaw Nation, the Government owning no title or right of occupancy except as might flow from its fiduciary relation to the Choctaw and Chickasaw Nations. The court below said that as to the power of Congress to give tribal lands to abutting land owners, it could not see where the fee title was vested in the tribes. The court below construed this Court's decision in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281, as striking down any such distinction saying that there this Court has said: "No case in this court has ever held that taking of Indian title or use by Congress required compensation."

In its opinion the court below also noted that it was the contention of the tribes that it was the intent of the second proviso to dispose only of narrow strips and gores and not to dispose of larger tracts such as we have here. The court below said: "The argument runs contrary to the language of the statute. * * * The second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements."

Finally the court below said: "A nullification of the second proviso on the Fifth Amendment ground here asserted would be a substantial detriment to the Indian allottees and their successors in interest. The efforts of Congress to effectuate the principles of the Atoka Agreement would be severely affected.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with U. S. v. Creek Nation, 295 U.S. 103, 109, 110, 79 L.Ed. 1331, 1335, 1336, 55 S.Ct. 581 (1934); U. S. v. Shoshone Tribe, 304 U.S. 111, 116, 82 L.Ed. 1213, 1218 (1938); Northwestern Shoshone Indians v. United States, 324 U.S. 334, 340, 89 L.Ed. 985, 990 (1945); and Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277, 278, 99 L.Ed. 314, 319 (1955).

In *U. S.* v. *Creek Nation*, 295 U.S. 103, 109, 110, 79 L.Ed. 1331, 1335, 1336, 55 Sup.Ct. 581 (1934), in an opinion delivered by Mr. Justice Van Devanter, this Court said:

> "A question is raised as to whether there was an appropriation or taking of the lands by the United States.
>
> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of the government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. *It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'* Lane v. Santa Rosa, 249 U.S. 110, 113, 63 L.Ed. 504, 506, 39 S.Ct. 185; Cherokee Nation v. Hitchcock, 187 U.S. 294, 307, 308, 47 L.ed. 183, 190, 23 S.Ct. 115." (Emphasis supplied.)

U. S. v. *Shoshone Tribe,* 304 U.S. 111, 116, 82 L.Ed. 1213, 1218 (1938), was an action brought by the Shoshone Tribe to recover the value of part of its reservation taken by the United States by putting upon it, without the tribe's consent, a band of Arapahoe Indians. The Court said that the purpose of the treaty was that the Shoshone should have their permanent dwelling in an identified district of the country. To that end the United States had granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. The Court observed that the words of the grant coupled with the government agreement to exclude strangers, negatived the idea that the United States retained beneficial ownership. The Court also said that the grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggested beneficial ownership in the tribe. The Court observed that the cession in 1904 by the tribe to the United States in trust reflects a construction by the tribe and the Government that supported the tribe's claim of ownership, for said the Court, if the tribe "did not own, a creation of trust to sell or lease for its benefits would have been unnecessary and inconsistent with the rights of the parties." The Court said at 82 L.Ed. 1218 that "for all practical purposes the tribe owned the land."

Mr. Justice Butler speaking for the Court said, at 304 U.S. 115, 116, 82 L.Ed. 1218, that even though the United States had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or appropriate to its own use any part of the land without rendering or assuming the obligation to

pay just compensation to the tribe, *"for that would be, not the exercise of guardianship or management, but confiscation."* (Emphasis supplied.)

In *Northwestern Shoshone Indians* v. *United States,* 324 U.S. 335, 340, 89 L.Ed. 985, 990 (1945), the Indian tribe sued the United States for the taking of lands held by the tribe by aboriginal and immemorial title. The tribe alleged that the United States had recognized its title by the Treaty at Box Elder. The Court said:

> "The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1963, to recognize or acknowledge by implication the Indian title to the lands mentioned in that treaty. United States v. Santa Fe R. R. Co., 314 U. S. 339, 347, 86 L.ed 260, 270, 62 S. Ct. 248. *From such recognition or acknowlcdgment by this treaty would flow a right of occupancy which would be compensable under the jurisdictional act."*

The Court, speaking through Mr. Justice Reed in *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 277, 278, 99 L.Ed. 314, 319 (1955), said:

> "Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. Citing United States v. Creek Nation, 295 US 103, 109, 110, 79 L.ed 1331, 1335, 1336, 55 S. Ct. 681; Shoshone Tribe v. United States, 299 US 475, 497, 81 L.Ed 360, 369, 57 S. Ct. 244; Chippewa Indians v. United States, 301 US 358, 375, 376, 81 L.ed. 1156, 1166, 1167, 57 S. Ct. 826; United States v. Klamath & M. Tribes, 304 US 119, 82 L.ed 1219, 58 S. Ct. 799; Sioux Tribe v. United States, 316 US 317, 326, 86 L.ed. 1501, 1507, 62 S. Ct. 1095."

The court below misconstrued Tee-Hit-Ton Indians v. United States.

In *Tee-Hit-Ton Indians* the tribe contended that the sale of the tribal land constituted a compensable taking by the United States of a portion of its proprietary interest in the land. The case turned on whether the United States had ever recognized any legal interest of the tribe in the land. The tribe asserted that when Russia took Alaska the tribe had a well developed social order which included a concept of tribal ownership; that Russia, while it possessed Alaska, in no manner interfered with the tribal claim to the land and that Congress had by subsequent acts recognized the proprietary interest of the tribe in the land. The Government contended that the Congress had never recognized any legal interest of the tribe in the land and therefore without such recognition no compensation was due the tribe by any taking by the United States.

The distinction between the facts in *Tee-Hit-Ton Indians* v. *United States* and these three cases at bar is readily apparent. The United States has always recognized the ownership of the Choctaw Nation and the Chickasaw Nation in the subject property and the court below so agreed, saying: "By virtue of the 1820 Treaty of Doaks Stand and the 1830 Treaty of Dancing Rabbit Creek the Choctaw Nation acquired from the United States in fee simple a large area of land in what is now the State of Oklahoma. The Chickasaw Nation later secured a one-fourth interest in the area which embraces the land in suit."

By the Treaty at Doaksville in 1837 (11 Stat. 573) between the Choctaw Nation and the Chicksaw Nation, the

Government recognized the ownership of the Choctaw Nation in the land ceded to them by the Treaty at Dancing Rabbit Creek.

The patent of March 23, 1842 recites that by the treaty began and held at Dancing Rabbit Creek on the 15th day of September, 1830, the United States covenanted that it would cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River ". . . in fee simple to them and their descendants . . ." and that ". . . in the execution of the agreement and stipulations in the aforesaid treaty . . ." United States of America ". . . by these Presents Do Give and Grant, unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi' to Have and to Hold the same . . . in fee simple to them and their descendants. . . ."

By the Treaty at Washington on June 22, 1855 (11 Stat. 611) the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

Again by the treaty between the United States and the Choctaw and Chickasaw Nations concluded in the City of Washington on April 28, 1866 (11 Stat. 769) the United States recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

And the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject lands by the Act of March 3, 1893 (27 Stat. 645) which created a commission for the purpose of inducing Choctaw and Chickasaw Nations (as well as the other members of the Five Civilized Tribes) to relinquish tribal ownership and to accept allotment of the lands in severalty.

By the Treaty concluded at Atoka, Indian Territory, on the 23rd day of April, 1897, commonly known as the "Atoka Agreement" (32 Stat. 1048), the Government again recognized the ownership of the Choctaw and Chickasaw Nations in the subject property.

And the Government did so again on June 28, 1898 by the commonly called "Curtis Bill" (30 Stat. 495).

It do so again in 1902 by the Choctaw-Chickasaw Supplemental Agreement (32 Stat. 64).

It did so again by the Act of April 26, 1906 (34 Stat. 137) under Section 14 on which the appellees base their claim.

The Government's recognition of the Choctaw and Chickasaw Nations' ownership in the lands ceded to the Choctaws by the Treaty of 1820 is indisputable.

The Government had never recognized tribal ownership in the lands involved in the *Tee-Hit-Ton Indians* v. *United States*. But in the three cases now before the Court the Government not only had ceded the fee title to the lands to the Choctaw Nation by its Treaty of 1820 but it had by many subsequent treaties and Congressional Acts and administrative actions recognized the ownership of the Choctaw Nation and the Chickasaw Nation of the lands involved in these actions.[5]

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[5] See also *Choctaw Nation* v. *United States*, 119 U.S. 38, 30 L.Ed. 119; *United States* v. *Choctaw and Chickasaw Nations*, 179 U.S. 494, 508, 45 L.Ed. 291, 297, and *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91.

Furthermore, and most importantly, this Court speaking through Mr. Justice Reed said in *Tee-Hit-Ton Indians* v. *United States:*[6]

> "Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. Citing United States v. Creek Nation, 295 U. S. 103, 109, 110, 79 L.ed 1331, 1335, 1336, 55 S.Ct. 681; Shoshone Tribe v. United States, 299 US 475, 497, 81 L.ed 360, 369, 57 S. Ct. 244, Chippewa Indians v. United States, 301 US 358, 375, 376, 81 L.ed 1156, 1166, 1167, 57 S. Ct. 826; United States v. Klamath & M. Tribes, 304 US 119, 82 L.ed 1219, 58 S. Ct. 799; Sioux Tribe v. United States 316 US 317, 326, 86 L.ed 1501, 1507, 62 S. Ct. 1095."

When this Court said in *Tee-Hit-Ton Indians* v. *United States that:* "No case in this court has ever held that taking title or use by Congress required compensation" it was speaking of those cases wherein the Indian tribe had only the right of occupancy. It was not speaking of those cases in which the fee title was vested in the Indian tribe.

The second proviso of Section 14 of the Act of April 6, 1906, was intended only to apply to narrow strips and gores which had no substantial value as separate tracts.

The second proviso of Section 14 of the Act of April 6, 1906 is unconstitutional if it gives to others lands owned by the Choctaw Nation and the Chickasaw Nation and which possess general utility and have substantial value as separate tracts. However, concededly, a fiduciary can abandon

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[6] 348 U.S. 277, 278.

property which is worthless or burdensome to the trust. It is assumed that in passing the second proviso Congress knew that it could not give away lands belonging to the Choctaw Nation or the Chickasaw Nation and which had substantial values as separate tracts without providing for the payment of just compensation to the tribes. On the other hand in passing the second proviso it may be assumed that Congress also knew that as guardian of the Indian tribes it could abandon worthless property and that which might be burdensome to the trust. If the application of the second proviso is limited to narrow strips and goes such as fragments of abandoned railroad rights-of-ways which have no general utility or substantial value as separate tracts, then the second proviso is constitutional.

But the court below said: "In fact, the second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements." If that construction is allowed to stand then obviously the second proviso is unconstitutional. The fiduciary power of the Government to give lands belonging to the tribes to other parties without providing for the payment of just compensation is dependent upon the value of the tract. If it has no substantial value as a separate tract the Congress has the power to give it away. If it has a substantial value as a separate tract Congress does not have that power. It cannot be gainsaid that a 200-acre tract does not have a substantial value as a separate tract or that a 40-acre tract does not hve a substantial value as a separate tract or that a 32-acre tract does not have a substantial value as a separate tract.

In *United States* v. *Magnolia Petroleum Company*, 110 F.2d 212, 217, the court below appeared to have recognized that Congress can only give away narrow strips and gores which do not possess general utility or have a substantial value as separate tracts, saying:

> "It is the general rule that the servient estate in a strip of land set apart for railway or highway right of way, or for a street, or a small area set apart for school, church, and other public purpose, passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved even though no express provision to that effect is contained in the instrument of conveyance and that on the abandonment of the strip or small area of the purpose for which it was set apart and dedicated the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting legal subdivisions or tract. * * * The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then becomes valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots."

Later in *United States* v. *Drumb*, 152 F.2d 821, 824, the court below speaking again of the Act of 1906 said:

> "The Act recognizes two classes of easements—those held by persons, associations and corporations and railroad rights of way. The former no doubt were occupied by churches, stores, schoolhouses or other buildings. They no doubt consisted of larger tracts, which possessed general utility and had substantial value as separate tracts. The law of reverter would not apply to such tracts."

The appellees assume the posture that the possibility of the termination of its easement was so remote that the burden of the easement made the land worthless; that the potential reversionary interests were actually a burden, millstones around the tribes' necks, so to speak, so that the Congress was in reality doing the tribes a favor when it cleared the deck for the termination of tribal affairs by taking away from the tribes the problem of what they might or might not do with these reversionary interests if and when the tribal existence terminated. Such a posture is *suggestio falsi.*

By 1906 the country east of the Mississippi had been webbed with railroads. It was a matter of common knowledge that, as they advanced across the continent, the railroads initially got water for the boilers of their steam engines from temporary reservoirs. But cities and towns sprang up along the railroads even as the tracks were being laid. These cities and towns soon developed their own municipal water systems and when they did the railroads abandoned the expediency of the temporary reservoirs and got the water for their steam engines from the water systems of the cities and towns.

The railroad's right-of-way might likely be permanent, and so might its station grounds, and even its stockyards. But by 1906 the country for decades had witnessed railroads abandon their reservoirs as municipal water systems became available. It was common knowledge that reservoirs were only expediencies.

Sixty years and more have now passed since the Act of 1906. All of the Five Civilized Tribes are still in exis-

tence. But for more than fifty of these sixty years the reservoirs of the railroads have been abandoned in the area of the Five Civilized Tribes. And that this would happen was forseeable in 1906 for one had only to see what the railroads have done in cities and towns which had developed municipal water systems to know that the abandonment of these reservoirs was not a remote possibility but, quite to the contrary, an almost dead certainty.

The cases now before the Court involve tracts which possessed general utility and had substantial value as separate tracts.

The cases in which the court below construed the second proviso involved only narrow strips or gores. For that reason they do not have the effect of *stare decisis* or constitute a rule of property which would control the three cases now before the Court. The question of the power of the Congress to give to abutting land owners large tracts which have a general utility and a substantial value as separate tracts had never been before the court below until the advent of the cases now at bar. The earlier decisions of the court below construing the second proviso did not in their aggregate create a rule of property which would now preclude the Choctaw Nation and the Chickasaw Nation from asserting their title to these lands. The rule is well stated at 20 Am. Jur.2d 528:

> "Where the facts are essentially different, stare decisis does not apply, for a perfectly sound principle as applied to one set of facts might be entirely inappropriate when a factual variance is introduced. Thus, a statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground,

> and still be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court or not shown to exist on the first attack."

To the same effect is *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33, 38, 97 L.Ed. 54, 58; *Radovich* v. *National Football League,* 77 Sup.Ct. 390.

As a rule of property the cases decided by the court below construing the second proviso would control only cases involving narrow strips and gores. They would not control cases involving large tracts which had general utility and substantial values as separate tracts. Indeed the first two of those cases were *United States* v. *Magnolia Petroleum Company and United States* v. *Drumb.* In each of those cases there was a forewarning that the law of reverter would not apply to large tracts which had a general utility and substantial values as separate tracts.

This Court said in its concluding paragraph to *Graves* v. *Schmidlapp,* 315 U.S. 657, 665, 86 L.Ed. 1097, 1103:

> "No interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution. See Burnett v. Coronado Oil and Gas Co., 285 U. S. 393, 406, footnote 1, 76 L.ed 815, 824, 52 S. Ct. 443, and cf. Helvering v. Mountain Producers Corp., 303 U. S. 376, 387, 82 L. ed 907, 914, 58 S. Ct. 623."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

J. D. McLAUGHLIN
Liberty National Bank Building
Paris, Texas

Attorney for Petitioners

of Counsel on the Brief:

LON KILE
Box 726
Hugo, Oklahoma

May, 1968

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
MAR 6 1968
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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9572 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants, v. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, AND DAVY C. MANER, Appellees.	)	Appeal from the United States District Court for the Eastern District of Oklahoma

Lon Kile for Appellants.

Streeter B. Flynn (Dan M. Welch of Rainey, Flynn, Welch, Wallace, Ross & Cooper were with him on the brief) for Appellees.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellants-plaintiffs Choctaw Nation and Chickasaw Nation, two Indian tribes, brought suit to secure possession of, quiet title to, and recover a reasonable rental for a tract of about 200 acres formerly reserved from allotment because of an easement acquired by a predecessor of the appellee, The Atchison, Topeka and Santa Fe Railway Com-

pany. The district court sustained a motion to dismiss and this appeal followed.

By virtue of the 1820 Treaty of Doaks Stand[1] and the 1830 Treaty of Dancing Rabbit Creek,[2] the Choctaw Nation acquired from the United States in fee simple a large area of land in what is now the State of Oklahoma. The Chickasaw Nation later secured a one-fourth interest in the area which embraces the land in suit.[3] The grants were to the tribes. Individual Indians had no title or enforceable right in tribal property.[4] Intolerable situations developed[5] and resulted in the appointment of the Dawes Commission to negotiate with the tribes for the extinguishment of their titles.[6] This Commission and the Choctaw and Chickasaw representatives made what is known as the Atoka Agreement which was incorporated into the Curtis Act, 30 Stat. 505, and later supplemented by a 1902 act, 32 Stat. 641, 657. This agreement provided, among other things, for the allotment of the lands to individual Indians.

The Enid and Anadarko Act of 1902[7] provided for the acquisition of railroad rights-of-way across these Indian lands and authorized the acquisition of easements by condemnation. Section 14 of that Act[8] provides in part:

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[1] 7 Stat. 210.

[2] 7 Stat. 333.

[3] See Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237.

[4] Choate v. Trapp, 224 U.S. 665, 671.

[5] Stephens v. Cherokee Nation, 174 U.S. 445, 450-451, contains an account of conditions existing in the tribal governments and refers to their corruption and irresponsibility. In Choate v. Trapp, 224 U.S. 665, 667, reference is made to the fact that the existence of an extensive area wherein private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.

[6] 27 Stat. 612, 645.

[7] 32 Stat. 43.

[8] 32 Stat. 47.

"And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purposes * * *."

Pursuant to this provision a predecessor of the Santa Fe acquired the land in question for reservoir purposes in 1903. The use was abandoned in 1910.

In 1906, Congress passed an act[9] to "provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." The Choctaws and Chickasaws are two of the Five Civilized Tribes. Section 14[10] of this Act says that lands reserved from allotment or sale under any act of Congress for the benefit of any person, corporation, or association shall be conveyed to the one entitled thereto. This is followed by two provisos. The first reads that if any reserved parcel has been abandoned before conveyance it "shall revert to the tribe and be disposed of as other surplus lands thereof." The second proviso is that railroad easements for "right of way, depot, station grounds, water stations, stock yards or other uses" may be acquired under regulations of the Secretary of the Interior and, if not so acquired and when the railroad ceases to use it for the reserved purpose, "shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part" except when the land is within a municipality.[11] The railroad did not acquire fee title to the land in dispute. The land is not

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[9] 34 Stat. 137.

[10] 34 Stat. 142.

[11] These statutory provisions are herein referred to as the second proviso.

located within a municipality. Under the second proviso title, free of the easement, vests in the abutting landowner upon abandonment of the easement.

We have repeatedly given effect to the second proviso and upheld the vesture of rights in accordance therewith. In United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, the history of the legislation with which we are concerned was reviewed and the vesture of railroad right-of-way in abutting landowners was uphold as against the claim asserted by the United States on behalf of the Indians that upon abandonment title passed to the Indian tribes. In United States v. Drumb, 10 Cir., 152 F.2d 821, another case concerning the Choctaws and Chickasaws, the court said: "Congress had the power to make a disposal of these contingent reversionary interests in railroad rights of way * * *." The principles announced in Magnolia and Drumb have been followed in seven other cases.[12]

The tribes say that the second proviso takes their lands without compensation in violation of the Fifth Amendment. The argument is that the tribes had fee title; that in the condemnation proceedings under the Enid and Anadarko Act whereby the railroad obtained its right, they were compensated only for the easement; and that the vesture of title in the abutting landowner takes their fee without payment.

The above mentioned Tenth Circuit decisions which recognized the validity of the 1906 Act and particularly the validity of the second proviso[13] are attacked on the ground

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[12] See Seminole Nation v. White, 10 Cir., 224 F.2d 173, cert. denied 350 U.S. 895; Chickasha Cotton Oil Co. v. Town of Maysville, 10 Cir., 249 F.2d 542; St. Louis-San Francisco Ry. v. Town of Francis, 10 Cir., 249 F.2d 546; City of Wilburton v. Swafford, 10 Cir., 253 F.2d 479; Town of Maysville v. Magnolia Petroleum Co., 10 Cir., 272 F.2d 806; Fitzgerald v. City of Ardmore, 10 Cir., 281 F.2d 717; and St. Louis-San Francisco Ry. v. Walter, 10 Cir., 305 F.2d 90.

[13] See particularly United States v. Drumb, 10 Cir., 152 F.2d 821, 823-824.

that they misconceived the holdings in Missouri, K. & T. Ry. v. Roberts, 152 U.S. 114, and Buttz v. Northern Pac. R. R., 119 U.S. 55, because those two cases related to situations where the Indians had only a right to possession and the fee was in the United States. In the cases with which this court has been concerned, and here, the fee is in the Indians by virtue of the Treaty of Dancing Rabbit Creek.[14] We see no validity in the distinction. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, an aboriginal possession case, the Court said that: "No case in this Court has ever held that taking of Indian title or use by Congress required compensation."

Each of these tribes "was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government."[15] In Choctaw Nation v. United States, 119 U.S. 1, 27, the Court, quoting from an earlier decision, said: "These Indian tribes *are* the wards of the nation; they are communities *dependent* on the United States * * *." In exercising control and management, the United States must act in good faith and in the best interests of its wards.[16]

In making final disposition of the affairs of the tribes, Congress was faced with the problem of the vesture of title upon the abandonment of an easement. It determined that title should vest in the abutting landowners. These landowners were either Indian allottees or their successors in title. Such disposition was neither unfair to the Indians nor contrary to their best interests. The contingent right went to the individual Indians or those who held under them. The United States as guardian did not benefit from the results of abandonment.

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[14] 7 Stat. 333, Art. II.

[15] United States v. Creek Nation, 295 U.S. 103, 109.

[16] Shoshone Tribe v. United States, 299 U.S. 476, 497.

The Indians say further that the intent of the second proviso was to dispose only of narrow strips and gores and not to dispose of larger tracts such as we have here. The argument runs contrary to the language of the statutes. The Enid and Anadarko Act permitted the railroads to acquire lands for reservoirs and water stations. The second proviso covers easements for a number of uses including "water stations" and "other uses." Reservoirs are not excluded from its terms. In fact, the second proviso says nothing about the size of the easement taken. We take it that Congress intended to include all railroad easements.

This is not a suit against the United States for any breach of a fiducial duty. Instead, it is a suit to oust those who hold pursuant to a statute of the United States. The specific attack is on the second proviso but the second proviso is an integral part of the statute making final disposition of the affairs of the tribes. It cannot be separated because to do so "would be inconsistent with the purpose and intent of the statute as a whole."[17] The United States in its sovereign capacity had the power to make final disposition of the lands and in so doing did not breach any duty owed by it to the Indians. A nullification of the second proviso on the Fifth Amendment ground here asserted would be a substantial detriment to the Indian allottees and their successors in interest.[18] The efforts of Congress to effectuate the principles of the Atoka Agreement [19] would be severely affected.

Affirmed.

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[17] United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, 218.

[18] The pertinent cases heretofore litigated in this court show that substantial economic values would be affected. See the cases cited in note 12.

[19] See 30 Stat. 505 and 32 Stat. 641, 657.

[APPENDIX]

FILED
United States Court of Appeals
Tenth Circuit
MAR 6 1968
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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9573 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants, v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and LEE F. WHITE, O. R. SMILEY AND MAMIE SMILEY, Appellees.	Appeal from the United States District Court for the Eastern District of Oklahoma

Lon Kile for Appellants.

Streeter B. Flynn (Reuel W. Little was with him on the brief) for Appellee.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is a companion case to No. 9572—Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, 10 Cir., ___F.2d___. Reference is made to the decision in that case for the pertinent treaties and statutes.

The land in question is a 32-acre reservoir tract reserved from allotment because of an easement obtained for

reservoir purposes by a predecessor of the appellee railway company in 1903. The complaint alleges an abandonment in 1910 and a conveyance to the Choctaw Nation and the Chickasaw Nation by the railroad in 1946. The answer and cross-claim of the appellees Lee F. White, O. R. Smiley, and Mamie Smiley, abutting landowners, allege abandonment in 1946. The railroad filed a disclaimer. The district court sustained a motion of the other appellees to dismiss.

In Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, supra, we held that upon abandonment of the reservoir easement, title vested to the abutting landowners. The same principle applies here whether the abandonment occurred in 1910 or 1946. The conveyance to the two Nations was a nullity because the railroad had nothing to convey.

Affirmed.

[APPENDIX]

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Tenth Circuit
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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9574 — JANUARY TERM, 1968

CHOCTAW NATION AND CHICKASAW NATION, Appellants,	)	
v.	)	Appeal from the United States District Court for the Eastern District of Oklahoma
C. G. SHULL, JR., AND RUBY MAE SHULL, PHOEBE JO SHULL now JONES, and J. B. JONES, GEORGE E. SHELTON AND WYNONA A. SHELTON, HAL WELCH, AND JOE WELCH, Appellees.	)	

Lon Kile for Appellants.

Hal Welch for Appellees.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is another case like Choctaw Nation v. The Atchison, Topeka and Santa Fe Railway Company, 10 Cir., ___ F.2d___, to which reference is made.

Here we are concerned with a tract about 40 acres in size on which the St. Louis & San Francisco Railway Com-

pany obtained a reservoir easement in 1902. The appellees-defendants are abutting landowners. The railroad abandoned the easement at some unstated date. In 1955 some of the appellees obtained a judgment against the successor to the original holder of the easement in which it was found that the reservoir use had been abandoned. The trial court granted a summary judgment in favor of the abutting landowners.

This case is controlled by Choctaw Nation v. The Atchison, Topeka and Santa Fe Railroad Company, supra. On the abandonment of the easement, the title vested in the abutting landowners.

Affirmed.

UPREME COURT, U. S.

FILED
OCT 12 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 161

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and DAVY C. MANER,
Respondents,
and
THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and LEE F. WHITE, O. R. SMILEY, and MAMIE SMILEY,
Respondents,
and
THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,
VERSUS
C. G. SHULL, JR., and RUBY MAE SHULL, PHOEBE JO SHULL now JONES and J. B. JONES, GEORGE E. SHELTON and WYNONA A. SHELTON, HAL WELCH and JO WELCH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DAN M. WELCH
STREETER B. FLYNN of
RAINEY, FLYNN, WELCH, WALLACE,
ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma 73102
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, et al., Respondents, and for Respondents, C. G. Shull, et al.

REUEL W. LITTLE
Little Building
Madill, Oklahoma
Attorney for Respondent St. Louis-San Francisco Railway Company

October, 1968

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. CE 5-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 161

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, and DAVY C. MANER,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and LEE F. WHITE, O. R. SMILEY, and MAMIE SMILEY,
Respondents,

and

THE CHOCTAW NATION AND CHICKASAW NATION,
Petitioners,

VERSUS

C. G. SHULL, JR. and RUBY MAE SHULL, PHOEBE JO SHULL now JONES and J. B. JONES, GEORGE E. SHELTON and WYNONA A. SHELTON, HAL WELCH and JO WELCH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

(All emphasis ours)

In the three cases which have been combined in this Court for briefing, the United States District Court for the Eastern District of Oklahoma, in the *Santa Fe* case, sustained

a motion to dismiss, and in the two other cases it sustained motions for summary judgments. In these suits Petitioners seek to quiet title to lands subject to easements, which had been acquired by railroads under the Act of February 28, 1902 (32 Stat. 43) for reservoirs to supply water for their steam locomotives, alleging that their use for such purpose had been abandoned.

The reservoir easements herein were all acquired pursuant to Sections 13 and 14 of the Act of February 28, 1902 (32 Stat. 43), commonly referred to as the Enid and Anadarko Act. This Act authorized the acquisition by condemnation of easements for all railroad purposes through the Indian Territory. Rights of way easements were in general limited to 100 feet in width, with additional ground for station grounds, buildings, depots, etc. It also provided that additional lands, not exceeding 40 acres at any one place, might be condemned when necessary for yards, tool houses, turntables, machine shops, water stations, and other facilities "and when necessary for a good and sufficient water supply in the operation of any railroad * * * shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream. * * *" The reason lands to be taken for reservoirs were not limited in area was because their size, of necessity, was dependent on the topography of the country. The reservoir easement in the Santa Fe case was for approximately 200 acres, while the reservoir easements in the companion cases were for 32 acres in the St. Louis-San Francisco Railway Company case and for 40 acres in the Shull case.

Congress subsequently passed the Act of April 26, 1906 (34 Stat. 137) styled *"An Act to provide for the final disposition of the affairs of the Five Civilized Tribes of the Indian Territory and for other purposes."* Petitioners are two of the Five Civilized Tribes. This Act goes into great detail as to just how this winding up process was to be accomplished. All unallotted and surplus lands of the Tribes were to be sold along with all tribal buildings, whether used for governmental or school purposes, together with furniture, and the money deposited in the treasury of the United States. The tribal existence was to continue until otherwise provided by law but the Tribes were shorn of all power.

In disposing of all tribal property, it was necessary to dispose of reversionary interests in lands subject to all kinds of easements. The method of disposition provided in Section 14 of the Act was divided into two categories based upon the use to which the easements were devoted:

One. Lands *"granted for the use and benefit of any person, corporation, or organization should be conveyed to the person, corporation, or organization entitled thereto."* No monetary consideration was required for these conveyances—evidently the United States as guardian considered the benevolent purposes to which the easements were devoted as sufficient. "Some of the tracts reserved consisted of 160 acres each, some of 80 acres, and some were smaller" (*United States* v. *Magnolia Petroleum Company*, 110 F.2d 212, 216).

Two. The second category comprised lands subject to railroad easements, which were not to be conveyed to the holder of the easement as was the case of the lands in the

first category, but the railroads were given an opportunity to acquire title upon the payment of a price to be fixed by the Secretary of the Interior. Should a railroad determine not to acquire the reversionary interest, the lands subject to the easements upon abandonment, *"shall thereupon vest in the owner of the legal subdivision of which the lands so abandoned is a part, except lands within a municipality, the title to which upon abandonment shall vest in such municipality."* (Italics ours.)

(An excellent analysis of the Act will be found in *U. S.* v. *Magnolia Petroleum Co.*, 110 F.2d 212.)

RESPONSE TO "QUESTION PRESENTED"

(Petitioners' Brief page 3)

We can understand from Petitioner's statement of the "Question Presented" as to the possible reason this Court requested a Response. It must have been somewhat confused as to why Respondents were made parties to quiet title suits when Petitioners state that the question involved *herein* is as to the right of the United States to "give lands, the fee simple title to which is vested in the Indian tribe to others *without rendering or assuming an obligation to render just compensation for them.*" The United States, which Petitioners claim assumed an obligation to render just compensation to them, is not a party to these suits.

REPLY TO "REASONS FOR GRANTING THE WRIT"

(Petitioners' Brief page 8)

Petitioners, under their first heading (page 8), complain that the opinion herein is in conflict with certain decisions of this Court, and under their next heading urge (page 11), that the lower court misconstrued this Court's opinion in *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272.

Petitioners, in the court below, attacked certain prior decisions of the Circuit Court upholding the validity of Section 14 of the Act of April 26, 1906, on the ground that the court therein erroneously applied the law, as announced by this Court in *Missouri, K. & T. Ry.* v. *Roberts,* 152 U.S. 114 and *Buttz v. Northern Pac. R.R.,* 119 U.S. 55. In those cases this Court was dealing with *Indian title,* a mere right of occupancy, as distinguished from cases involving fee title lands. It is perfectly apparent from the lower court's opinion that it clearly understood the difference, although both classes of land could be disposed of by the United States. In the case of Indian title lands, the United States was the owner of the fee and as to fee lands of the Tribes, the United States had the authority, as guardian, to dispose of its wards' property.

In the opinion below, the Court quotes from *Tee-Hit-Ton Indians* v. *United States, supra,* as follows:

> "No case in this court has ever held that taking of Indian title or use by Congress required compensation."

Petitioners construe this quotation, dealing with Indian title lands only, as being applicable herein to fee lands.

In the two paragraphs of its opinion following the above quotation, the lower court points out that land held by petitioners herein was subject to control and management by the United States and that the United States, in exercising its control, could dispose of its wards' lands if it acted in good faith and for the best interests of its wards.

In the first of these two paragraphs, the lower court, as its authority quotes from *United States* v. *Creek Nation*, 295 U.S. 103, 109 and *Choctaw Nation* v. *United States*, 119 U.S. 1, 27, and cites *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497.

REPLY TO PETITIONERS' HEADING "THE SECOND PROVISO OF SECTION 14 OF THE ACT OF APRIL 26, 1906, WAS INTENDED ONLY TO APPLY TO NARROW STRIPS AND GORES WHICH HAD NO SUBSTANTIAL VALUE AS SEPARATE TRACTS."

(Petitioners' Brief page 14)

The argument that Congress only intended the second proviso of Section 14 of the Act of April 26, 1906 to dispose of small strips of land, such as land subject to rights-of-way easements, was rather summarily disposed of by the court below as follows: "The argument runs contrary to the language of the statute."

Petitioners cite no authority for their position, but rely on what they state was *common knowledge* when the Act was passed in 1906. If such common knowledge in fact existed, it apparently had not percolated back to Congress, for nowhere in Section 14 of the Act is any distinction made as to the size of the lands subject to railroad or the other easements disposed of.

In addition in so far as the intent of Congress is concerned it will be observed that in the first portion of Section 14 disposition was made of all lands subject to easements other than such as were subject to railroad easements which were treated separately. "Some of the tracts reserved consisted of 160 acres each, some of 80 acres, and some were smaller." *United States* v. *Magnolia Petroleum Company,* 110 F.2d 212, 216.

It is perfectly clear from the Act as a whole that Congress intended, in its scheme of winding up the affairs of the Tribes, to dispose of all tribal property.

REASONS WHY THE WRIT PRAYED FOR BY PETITIONERS SHOULD NOT BE GRANTED

1. If the disposal of the contingent reversionary interests involved herein was wrongful, Appellants' remedy is to seek compensation from the United States.

Although we are firmly convinced that the Act of April 26, 1906, was clearly for the benefit and protection of the Indians and is constitutional, should we be mistaken and should this Court conclude that something of value belonging to the Tribes had wrongfully been disposed of by Congress, Appellants' remedy is to seek compensation from the United States for its breach of trust. They have no cause of action against Appellees. In *United States* v. *Klamath Indians,* 304 U.S. 119, 123, it was said:

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States *without paying*

*just compensation therefor to appropriate lands of the Indian tribe to its own use or hand them over to others. * * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."*

See also:

—*U. S.* v. *Creek Nation*, 295 U.S. 103, 110, 111;

Shoshone Tribe v. *U. S.*, 299 U.S. 476, 497.

2. A strong presumption exists in favor of constitutionality of Act of April 26, 1906.

In approaching the question of the constitutionality of the Section of the Act in question, as well as of the statutes in general, there is a strong presumption in favor of their constitutional validity. In addition there is a strong presumption herein that the United States, acting in its capacity as guardian of the Indians, acted in good faith and for the best interests of its wards in dealing with their affairs and property. Nothing contained in Appellants' complaint or brief casts any cloud on these presumptions. The bare fact that Congress, in Section 14, vested these reversionary interests in railroad easements in the adjoining landowners, usually allottee members of the tribe, or in a municipality in the event the easement was within its borders, is clearly insufficient to overcome these presumptions.

"Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt" (Sinking-Fund Cases, 99 U.S. 700, 718).

"But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, *the existence of the circumstances necessary to support it must be presumed.* Talbot v. Hudson, 16 Gray, 417, 422; Fletcher v. Peck, 6 Crouch, 87, 128; Sinking Fund cases, 99 U.S. 700, 718." *Sweet* v. *Rechel,* 159 U.S. 380, 392, 393.

See also:

—*Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 568;

Home Tel. Co. v. *Los Angeles,* 211 U.S. 265, 281.

3. The United States as guardian had power to manage tribal land and affairs for the protection and welfare of the Indians.

That Congress had plenary authority to deal with tribal property and affairs cannot be questioned, and as long as it acts in good faith and in a manner beneficial to its wards, it incurs no obligation to make compensation for any lands taken:

"That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States,* 119 U.S. 1, 27, and *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 483." *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 567.

"The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for *protection and advancing the tribe,* it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions." *United States* v. *Creek Nation,* 295 U.S. 103, 109.

"Power to control and manage the *property and affairs* of Indians in good faith for *their betterment and welfare* may be exerted in many ways and at times in derogation of the provisions of a treaty." *Shoshone Tribe* v. *U. S.,* 299 U.S. 476, 397.

See also:

—*Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 306;

Tiger v. *Western Investment Co.,* 221 U.S. 286, 311;

Choate v. *Trapp,* 244 U.S. 665, 671;

Chippewa Indians v. *U. S.,* 301 U.S. 358, 375;

U. S. v. *Klamath Indians,* 304 U.S. 119, 123.

There is no allegation in the petition herein that the United States in disposing of lands subject to railroad easements acted in bad faith, nor that its disposition of such lands was not in the best interests of the Indians and for their betterment and protection.

Let us now turn to the question as to whether the United States as guardian in the winding up of tribal affairs in the manner authorized by Congress, was acting in the best interests of its wards.

In reality, the Act was one of emancipation for the Indians. Congress knew of the shocking conditions existing in the tribal governments, since it had before it reports made by one of its committees and by the Dawes Commission. Excerpts from the reports will be found in the case of *Stephens* v. *Cherokee Nation*, 174 U.S. 445, some of which are as follows:

> "As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians * * *. While we have recognized these tribes as dependent nations, the Government has likewise recognized *its guardianship over the Indians and its obligations to protect them in their property and personal rights*" (p. 450).
>
> "It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse." (p. 451).
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> "The Commission is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary" (p. 452).
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> * * * * * * *
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> "The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will

restore to the people the benefit of the tribal property, and that security and order in government enjoyed by the people of the United States will be in vain" (p. 452).

* * * * * * *

"Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. *Insecurity of life and person and property increasing every day makes* immediate action imperative" (p. 453).

* * * * * * *

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report *that those governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they* scarcely pretend to protect" (p. 453).

* * * * * * *

"The condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their people, has been fully set forth in former reports of the Commission as well as in the reports of Congressional committees commissioned to make inquiry on the ground. It would be but repetition to attempt again a recital. Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, *but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them*" (p. 460).

In view of the deporable conditions existing among the Indians of the Five Civilized Tribes which prompted passage of the Act of April 26, 1906, we are confident this Court will find that Congress acted in the utmost good faith and for the welfare and protection of its wards. Such a finding will dispose of the constitutional question raised by Appellants.

4. The reversionary interests in railroad easements were of no value in 1906 at the time of disposition.

The contingent reversionary interests in both classes of easements covered by Section 14 had to be disposed of before the winding up of the affairs of the tribes could be completed. The contingent interests in the first category of easements in Section 14 were vested in the persons or institutions holding the easements without any monetary consideration. Some of these uses or easements were for 160 acres; some for 80 acres, and others for less. (Easements granted in the Choctaw and Chickasaw tribal lands will be found in the Choctaw-Chickasaw Supplemental Agreement (32 Stat. 641, Section 26) and in the Cherokee lands in Cherokee Allotment Agreement (32 Stat. 716, Section 24).

In the case of railroad easements, however, Congress did not give the contingent reversionary interests to the railroads, but merely gave them options to purchase at prices to be fixed by the Secertary of the Interior. Insofar as we can learn, the railroads were uninterested in these empty options, for just why, as a business proposition, would they pay for something which added no value to the exclusive and perpetual easements which they already had? It is true, when the railroads failed to purchase these contingent re-

versionary interests, Congress might have endeavored to sell them, as it did the surplus and unallotted lands, before it vested title thereto in the adjoining landowners or municipalities, depending on the location of the easements. Such a gesture, however, would have been futile, since no one would even know how to make an intelligent bid for a contingent reversionary interest in one of these far from ordinary easements carrying with it "perpetuity and exclusive use and possession"? (*New Mexico* v. *U. S. Trust Co.*, 172 U.S. 171.)

Congress in vesting these reversionary interests in the adjoining landowners or in municipalities resulted in no injustice to the tribes. They had already, in fact, in the condemnation proceedings, received as damages the full value of the lands assessed, on the theory that the easements would be perpetual and exclusive.

This Court in *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 183, in discussing the peculiar nature of railroad easements, quoted the following:

> " 'Unlike the use of a private way—that is, discontinuous—*the use of land condemned by a railroad company is perpetual and continuous.*' New York, Susquehanna & Western Railroad v. Trimmer, 52 N.J.L. 1, 3."

This Court then continued:

> "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, *perpetuity and exclusive use and possession;* also the remedies of the fee, and, like it, corporeal, not incorporeal, property.
>
> "In Smith v. Hall, 72 N.W.Rep. 427, the Supreme Court of Iowa, says, speaking of the right of way of a

railroad: 'The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually *a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land* is underlaid by a quarry or mine.'

" 'The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land *permanent in its nature and practically exclusive.*' Hazen v. Boston & Maine Railroad, 2 Gray, 574, 580."

To the same effect see:

—*Western Union Tel. Co.* v. *Penn R.R., et al.*, 195 U.S. 540, 570.

In *Bowers* v. *Atchison, Topeka & Santa Fe Railway Company*, 119 Kan. 202, 237 Pac. 913, 42 A.L.R. 228 (cited in *U. S.* v. *Magnolia Pet. Co.*, 110 Fed. 212, at 217), the Supreme Court of Kansas said (p. 234):

"It is true the most unexpected things may happen and it might be that the *Santa Fe Railway system would go out of existence.* In that event, the rule that it has only an easement in its right of way would be applied; but for all practical purposes, including burdens as well as benefits, the railway company is the owner of land acquired for railway purposes. Schaff v. Roberts, 113 Kan. 423, 215 Pac. 447. In the case of Western U. Teleg. Co. v. Pennsylvania R. Co., 195 U.S. 540, 49 L.ed. 312, 25 Sup.Ct.Rep. 133, 1 Ann.Cas. 517, the court said:

" 'A railroad right of way is a very substantial thing. It is more than a mere right of passage. *It is more than*

an easement. We discussed its character in New Mexico v. United States Trust Co., 172 U.S. 186, 43 L.Ed. 413, 19 Sup.Ct.Rep. 881. We there said (page 183) that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal property." ' "

The Act of April 26, 1906, certainly will not be declared unconstitutional because it disposed of contingent reversionary rights which had no monetary value in 1906 at the time of disposition.

5. The second proviso of Section 14 is such an integral part of the Act of April 26, 1906, that if it is held to be unconstitutional, the entire Act falls.

Petitioners seek to have this Court strike down the second proviso of Section 14 of the Act of April 26, 1906, on the ground that it is unconstitutional. Should the Court agree with Petitioners' contention, it must then decide whether the section is such an integral part of the Act that it alone cannot be stricken without thwarting the purpose and intent of the Congress. We submit this inseparability is recognized by the Circuit Court in *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212, 218:

" 'To say that on failure of a railroad company to make payment of a narrow strip reserved for a right-of-way or on its abandonment for such purpose, title *rests in the tribe, would be inconsistent with the purpose and intent of the statute as a whole, would be out of harmony with the manifest purpose of Section 14, and* would be at variance with the rule against retention of title in remote dedicators. It would be an interpretation not warranted by the language of the section.' "

In *Chickasha Cotton Oil Co.* v. *Town of Maysville*, 249 F.2d 542, the same Court, in referring to the Act, said:

> "It was a comprehensive Act and made meticulous provision for winding up the affairs of the tribes. Section 14 thereof concerned itself with disposition of land reserved from allotment, including reversionary interest in land reserved for railroad right of way purposes.
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> * * * * * * *
>
> "Under date of June 12, 1908, the Secretary of the Interior, acting through the Commissioner of Indian Affairs, promulgated a regulation governing the acquirement of title by railroad or railway companies occupying land in the former Indian Territory for depots, station grounds, water stations, stock yards, or other uses connected with the maintenance or operation of railroad or railway companies. * * * These several statutory provisions and the regulation promulgated by the Secretary of the Interior *must be considered together as integrated parts of the whole.*"

CONCLUSION

The instant cases are the last of a series extending over many years involving the validity of the disposition by Congress of the reversionary interests in Indian lands subject to railroad easements. In none of these cases, cited in the opinion below, was the Tribe or its successors successful.

It is respectfully urged that the Writ prayed for by petitioners be denied.

DAN M. WELCH
STREETER B. FLYNN of
RAINEY, FLYNN, WELCH, WALLACE,
ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma 73102

Attorneys for The Atchison, Topeka and Santa Fe Railway Company, et al., Respondents, and for Respondents, C. G. Shull, et al.

REUEL W. LITTLE
Little Building
Madill, Oklahoma

Attorney for Respondent, St. Louis-San Francisco Railway Company

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In the Supreme Court of the United States

OCTOBER TERM, 1968

THE CHOCTAW NATION AND CHICKASAW NATION,
PETITIONERS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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On October 28, 1968, the Court invited the Solicitor General to state the views of the United States in these consolidated cases.

Petitioners are the Choctaw Nation and Chickasaw Nation, two of the Five Civilized Indian Tribes in the Indian Territory (now Oklahoma). They instituted these three suits to secure possession of, quiet title to, and recover reasonable rentals for, three tracts of Ok-

lahoma land (consisting of some 200, 32 and 40 acres, respectively) which had been reserved from allotment to individual tribal members because of reservoir easements acquired by railroads through condemnation in 1902 and 1903, pursuant to the Enid and Anadarko Act of 1902 (32 Stat. 43, 47).[1] In 1906, Congress made provision for disposing of the affairs of the Five Civilized Tribes, after lands had been allotted to the individual members (Act of April 26, 1906, 34 Stat. 137). Section 14 of the 1906 Act (Pet. 3-4) provided that title to land reserved from allotment for the use of any person or corporation should revert to the tribe if such use were abandoned and disposed of as other surplus lands for benefit of the tribes. Railroad easements were, however, excepted. The second proviso of Section 14 permitted railroads to acquire title to lands subject to such easements by payment of the value thereof under regulations of the Secretary of the Interior. Upon failure so to acquire and cessation of such use by railroads, title was to "vest in the owner of the legal subdivision of which the land so abandoned is a part," except when the land was within a municipality. The railroads here never acquired such title and thereafter abandoned the easements. Nor are the lands involved located within a municipality. Accordingly, the courts below determined that, under the pertinent statute, title to the lands involved vested in the abutting landowners, and the court of appeals af-

[1] A more complete statement of the underlying facts and background is contained in the opinion of the court of appeals (see Pet. App. ii-iv).

firmed the district court's entry of judgment in respondents' favor (Pet. App. i-ix; 396 F.2d 578).

No warrant exists, in our view, for granting the instant petition. The problem presented is confined to the Five Civilized Tribes in Oklahoma and can only arise in the Tenth Circuit. In an unbroken line of decisions (*e.g.*, *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212 (C.A. 10); see Pet. App. iv, and cases cited in n. 12),[2] that court of appeals has consistently held that title to lands in these circumstances vests in the abutting landowners or, where relevant, in the appropriate municipality. No conflict of decisions thus exists or can ever develop. Nor is there any need for review by this Court in order to stabilize land titles. Indeed, revesting title in petitioners would be contrary to the intent of Congress to terminate tribal affairs, and unsettling to the Indian allottees and their successors in interest. Moreover, the decisions below plainly reflect the statutory mandate, since Congress did not specify that title to only narrow or small strips and gores of insubstantial value would so vest (see Pet. App. vi).

There are at least several answers to petitioners' claim of an unconstitutional taking by the United States. First, it would be inappropriate for this Court to reach and resolve that issue here, for the United States is not, and never has been, a party to these ac-

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[2] As the court below noted, in the *Magnolia Petroleum Co.* case, and similar earlier cases involving this issue, "the vesture of railroad right-of-way in abutting landowners was upheld as against the claim asserted *by the United States* on behalf of the Indians that upon abandonment title passed to the Indian tribes" (Pet. App. iv; emphasis added).

tions. Second, in providing that title to such lands be vested in abutting landowners, Section 14 of the 1906 Act simply set forth what an allotment of land subject to a railroad easement would include—title to the underlying fee if the railroad failed to acquire it or lost its right to do so through non-use of the easement. Thus, the 1906 Act did not take the property of petitioners and give it to another, any more than did the Atoka Agreement and ratifying acts providing for allotment of tribal property to individual members of the tribes and for lands for towns, cemeteries, schools, churches, etc., within Indian country (Curtis Act of 1898, 30 Stat. 505-513, as supplemented, 32 Stat. 641, 645, 652, 657). That legislation merely prescribed how the property was to be divided among the Indians themselves and used for their benefit. Management and control of the property of the Five Civilized Tribes was of course within the power of Congress. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568; *United States* v. *Seminole Nation*, 299 U.S. 417, 428. In this connection, as the court below observed, the United States derived no benefit as a result of the easement abandonments (Pet. App. v).

In short, what Congress did was to individualize the holdings of tribal land, not to take such property. Incident to a plan for such individualization, Congress simply determined to permit abutting landowners—initially tribal members—to take the land covered by the railroad easements upon their abandonment, rather than to provide initially for the inclusion of these areas within the allotments of land to individual tribal members.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

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